FOO JONG WEE & ORS v. HJ AFIFI HJ HASSAN

COURT OF APPEAL, PUTRAJAYA
ALIZATUL KHAIR OSMAN JCA
AZIAH ALI JCA
MOHD ZAWAWI SALLEH JCA
[CIVIL APPEAL NO: W-02-696-03-2013]
4 MAY 2016

COMPANY LAW: *Winding up – Petition – Just and equitable grounds – Restructuring of company to comply with statutory requirements – Majority of shares vested in Bumiputeras – Whether restructuring agreement intended to circumvent statute and illegal – Petitioner participated and benefited from illegal arrangement – Whether just and equitable for company to be wound up – Registration of Engineers Act 1967, ss. 7A(3), 10(4)*

Norman Disney & Young Sdn Bhd (the first respondent in the court below) (the 'company') was by majority, owned and controlled by an engineering consulting firm based in Australia ('the Australian company'). In 1994, the company was restructured to comply with the statutory requirements of s. 7A(3) and s. 10(4) of the Registration of Engineers Act 1967 ('REA 1967'). The restructuring exercise was intended to vest majority shares in the hands of Bumiputera. Arising out of the restructuring exercise, the respondent became the registered shareholder of 65% of the issued capital of 100,000 shares in the company. The remaining 35% of the shares were held by the appellants who were the directors of the company. The restructuring involved the execution of nine agreements whereby the net result of the transaction was that the Australian company would retain voting control over the company through a power of attorney. By that arrangement, on the face of the register, the company became a Bumiputera majority company and the company appeared to comply with the REA 1967. Subsequently, the parties' business relationship fell apart, which led the respondent to file a winding up petition on just and equitable grounds against the company under s. 218(1)(f) and 218(1)(i) of the Companies Act 1965 ('the petition'). The respondent's main contention was that, *inter alia*, there was deception and misrepresentation by the directors of the company by presenting that the company was owned and controlled by a Bumiputera. The Judicial Commissioner ('JC') allowed the respondent's petition. Hence, the present appeal. The issue that arose for determination was whether it was just and equitable that the company should be wound up when the petitioner had participated and benefited from the illegal arrangement.

Held (dismissing appeal with costs)
Per Alizatul Khair Osman JCA delivering the judgment of the court:

(1) The relief sought under the just and equitable ground should not be refused because of the petitioner's unclean hands. The court should not confine itself on the issue of *locus* and no more, which the petitioner must

A prove to entitle himself to relief, but rather at the whole range of facts adduced which may be essential to the establishment of what is just and expedient or equitable. (paras 33 & 35)

(2) *Holman v. Johnson* (and the 'hands-off approach') applies in contractual claims where the court would not lend its aid to a man who found his B cause of action upon an immoral or an illegal act, and is of little assistance to the court when faced with a request to make a winding up order in respect of a company shown to be illegal in its inception, when that request is made by a party who is in *pari delicto*. As to what is just and equitable in relation to the question of winding up is based on the C question whether, on the whole evidence, it is just and expedient that the company should be wound up. In this connection, the illegality defence would not weigh against all the other considerations in the case. (paras 21 & 39)

Bahasa Malaysia *Headnotes*

D

Norman Disney & Young Sdn Bhd (responden pertama di mahkamah di bawah) ('syarikat') dengan majoriti, dimiliki dan dikawal oleh sebuah firma perunding kejuruteraan yang berpangkalan di Australia ('syarikat Australia'). Pada 1994, syarikat tersebut distrukturkan semula bagi mematuhi keperluan E undang-undang s. 7A(3) dan s. 10(4) Akta Pendaftaran Jurutera 1967 ('APJ 1967'). Langkah penstrukturan semula bertujuan untuk memberi hak saham majoriti kepada Bumiputera. Berdasarkan kepada langkah penstrukturan semula tersebut, responden menjadi pemegang saham berdaftar 65% daripada modal terbitan 100,000 saham syarikat itu. Baki 35% daripada saham dipegang oleh perayu-perayu yang merupakan pengarah syarikat. F Penstrukturan semula ini melibatkan pelaksanaan sembilan perjanjian di mana hasil bersih transaksi adalah syarikat Australia akan mengekalkan kawalan pengundian terhadap syarikat melalui surat kuasa wakil. Melalui pengaturan itu, atas pendaftaran, syarikat menjadi syarikat majoriti Bumiputera dan syarikat kelihatan mematuhi APJ 1967. Lantaran, hubungan G perniagaan pihak-pihak berpecah menyebabkan responden memfailkan petisyen penggulungan atas alasan adil dan saksama terhadap syarikat di bawah s. 218(1)(f) dan 218(1)(i) Akta Syarikat 1965 ('petisyen itu'). Hujahan utama responden adalah bahawa, antara lain, terdapat perdayaan dan salah nyataan oleh pengarah-pengarah syarikat dengan mengemukakan bahawa H syarikat itu dimiliki dan dikawal oleh Bumiputera. Pesuruhjaya Kehakiman ('PK') membenarkan petisyen responden. Oleh itu, rayuan ini. Isu yang berbangkit untuk penentuan adalah sama ada adalah adil dan saksama bagi syarikat digulungkan apabila pempetisyen menyertai dan mendapat manfaat daripada pengaturan yang menyalahi undang-undang.

I

Diputuskan (menolak rayuan dengan kos)
Oleh Alizatul Khair Osman HMR menyampaikan penghakiman mahkamah:

(1) Relif yang dipohon bagi alasan yang adil dan saksama tidak harus ditolak kerana tangan pempetisyen terpalit kekotoran. Mahkamah tidak harus membataskan dirinya atas isu *locus* dan tidak lebih, di mana pempetisyen mesti membuktikan bagi melayakkan dirinya untuk relif, tetapi pada keseluruhan fakta yang dikemukakan yang mungkin penting kepada pembuktian apa yang adil dan bermanfaat atau saksama.

(2) *Holman v. Johnson* (dan 'hands-off approach') terpakai dalam tuntutan kontrak di mana mahkamah tidak akan membantu sesiapa yang membentuk kausa tindakan dengan perbuatan yang tidak bermoral dan menyalahi undang-undang dan tidak berfaedah kepada mahkamah apabila berhadapan dengan permohonan untuk membuat perintah penggulungan berkenaan dengan syarikat yang dikatakan menyalahi undang-undang pada permulaannya apabila permintaan dibuat oleh pihak *pari delicto*. Mengenai apa yang adil dan saksama berhubung dengan persoalan penggulungan berdasarkan soalan sama ada pada keseluruhan keterangan, adalah bersesuaian dan bermanfaat bagi syarikat tersebut untuk digulungkan. Sehubungan itu pembelaan menyalahi undang-undang tidak akan mempunyai kepentingan terhadap semua pertimbangan dalam kes ini.

Case(s) referred to:
Baldev Singh v. Mahima Singh & Ors [1974] 1 LNS 13 HC ***(refd)***
Fusing Construction Sdn Bhd v. EON Finance Bhd & Ors And Another Appeal [2000] 3 CLJ 341 CA ***(refd)***
Holman v. Johnson (1775) 1 Cowp 341 ***(refd)***
In re London and County Coal Company (1866) LR 3 Eq 355 ***(refd)***
In the Matter of the Neath Harbour Smelting and Rolling Works (Limited) (1886) 2 TLR 336 ***(refd)***
Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Anor [1989] 1 CLJ 897; [1989] 1 CLJ (Rep) 1 PC ***(refd)***
Lim Kar Bee v. Duofortis Properties (M) Sdn Bhd [1992] 3 CLJ 1667; [1992] 1 CLJ (Rep) 173 SC ***(refd)***
Norman Disney & Young v. Affifi Hj Hassan [2011] 1 CLJ 210 HC ***(refd)***
Padiberas Nasional Bhd v. Formula Timur Sdn Bhd [2009] 8 CLJ 508 HC ***(refd)***
Palaniappa Chettiar v. Arunasalam Chettiar [1962] AC 294 ***(refd)***
Perbadanan Kemajuan Pertanian Selangor v. Megafores Nursery Sdn Bhd & Ors [2011] 8 CLJ 484 HC ***(refd)***
Re Bleriot Manufacturing Aircraft Company (Limited) (1916) 32 TLR 253 ***(refd)***
Re International Securities Corporation Limited (1908) 99 LTR 581 ***(refd)***
Re The Producers Real Estate and Finance Co. Ltd [1936] VLR 235 ***(refd)***
Re Thomas Edward Brinsmead & Son Ltd [1897] 1 Ch 406 ***(refd)***
Suntoso Jacob v. Kong Miao Ming & Anor [1984] 1 LNS 32 HC ***(refd)***
Teng Meow Chong v. Chia Ngim Fong & Anor [1991] 1 LNS 35 HC ***(refd)***
Thong Foo Ching & Ors v. Shigenori Ono [1998] 4 CLJ 674 CA ***(refd)***

Legislation referred to:
Companies Act 1965 s. 218(1)(f), (i)
Contracts Act 1950, s. 24(a), (b), (e)
Registration of Engineers Act 1967, ss. 7A(3), 10(4)

Other source(s) referred to:
A R Keay, *McPherson The Law of Company Liquidation*, 4th edn, LBC Information Services, pp 153-154
SD Girvin, S Frisby & A Hudson, *Charlesworth's Company Law*, Sweet & Maxwell, 18th edn, p 528

For the appellants - WSW Davidson, HL Wong, SM Sakthy & Soh Jing Han; M/s Azman Davidson & Co
For the respondent - Lim Kiang Leong & Tan Wei Wei; M/s Lim Kian Leong & Co

[Editor's note: For the High Court judgment, please see Hj Afifi Hj Hassan v. Norman Disney & Young Sdn Bhd [2013] 1 LNS 339 (affirmed).]

Reported by Sandra Gabriel

JUDGMENT

Alizatul Khair Osman JCA:

Introduction

[1] This is an appeal against the decision of the learned Judicial Commissioner (JC) who allowed the winding up petition of the respondent (the petitioner in the court below) against the company Norman Disney & Young Sdn Bhd (the first respondent in the court below) (the company) on just and equitable ground premised on an illegality. The learned JC in her judgment held *inter alia*, as follows:

> … I am of the considered opinion that it was just and equitable to wind-up the 1st respondent company pursuant to s. 218(1)(i) of Act 125 on the ground that the carrying on of business by the company is illegal and in breach of the statutory requirements of the Registration of Engineers Act 1967 …

[2] The learned JC's decision gave rise to the following issue which is the main thrust of the appeal before us:

> Whether the court should assist a petitioner to wind-up a company on just and equitable ground premised on an illegality when the petitioner is a party to that illegality.

Facts

[3] The salient facts are briefly as follows:

(i) Norman Disney & Young Sdn Bhd ('the company') was incorporated in 1982. It is a company engaged in the business of consulting engineers. From its inception until 1994, the company was majority owned and controlled by Norman Disney and Young, an engineering consulting

firm based in Australia ('the Australian company'). In 1994 the company was restructured to comply with the statutory requirements of s. 7A(3) and s. 10(4) of the Registration of Engineers Act 1967 ('REA 1967') where all shares in the company are to be held by Malaysians and professional engineers. The restructuring exercise also intended to vest majority shares in the hands of Bumiputera; and

(ii) Arising out of the restructuring exercise the respondent became the registered shareholder of 65% of the issued capital of 100,000 shares in the company. The remaining 35% of the shares were held by the appellants.

[4] The restructuring was made feasible *via*, as the learned JC puts, "an elaborate scheme" which involves the respondent (the petitioner in the court below), the company and the first appellant. The said scheme involves the execution of nine agreements, all dated 28 September 1994 and they are as follows:

(a) a sale and purchase agreement between Liew Yan Sin ("LYS") and the respondent for the sale of 60,000 ordinary shares ("60,000") held by LYS to the respondent;

(b) a loan agreement between the respondent (as borrower) and LYS, as the lender in respect of the 60,000 shares;

(c) a shareholders agreement between LYS, the respondent and the first appellant;

(d) a call and put option agreement between the respondent and the Australian company which gives the latter an option to purchase the 60,000 shares;

(e) a deed of novation executed by LYS, the respondent and the Australian company whereby LYS assigned all his rights under the loan agreement to the Australian company, with the respondent as the debtor;

(f) power of attorney given by the respondent appointing the Australian company as the respondent's lawful attorneys over the 60,000 shares;

(g) a sale and purchase agreement between LYS and the respondent for the sale of 5,000 ordinary shares for RM62,400 which constituted a debt owing by the respondent to the Australian company and secured by a charge over the 5,000 shares;

(h) a loan agreement between the respondent (as the borrower) and the Australian company, as the lender in respect of the 5,000 shares;

(i) a call option for the purchase of the 5,000 shares between the respondent and the Australian company;

A (j) a call option agreement between the respondent and the Australian company in respect of 50,000 shares; and

(k) power of attorney given by the respondent appointing the Australian company as the lawful attorney in relation to the 5,000 shares, 10,000 shares and 50,000 shares respectively.

B

[5] The net result of this transaction was that in point of fact the Australian company would retain voting control over the company through the power of attorney. By that arrangement, on the face of the register the company became a Bumiputera majority company and the company appeared to comply with the REA 1967 since all shareholders were

C Malaysian professional engineers.

[6] From then on until the earlier part of 2009 the parties' business relationship fell apart, leading to litigation between them where the respondent filed a winding up petition of the company under s. 218(1)(f) and

D 218(1)(i) of the Companies Act 1965 ('the petition'). This petition is the subject matter giving rise to the instant appeal. Almost immediate to the respondent filing the petition, the Australian company exercised their call option to purchase the entire shareholding of the respondent in the company. The respondent having refused to accede to the call option, the Australian

E company commenced a civil suit at the Kuala Lumpur High Court Suit No. S-22-669-2009 ('Suit 669') seeking a declaratory order that they are the beneficial owner of the respondent's shareholding in the company and for specific performance of the call option and other reliefs.

[7] Suit 669 was struck out at the instance of the respondent. Lee Swee

F Seng JC reached that decision for two reasons (the decision is reported in *Norman Disney & Young v. Affifi Hj Hassan* [2011] 1 CLJ 210; [2010] MLJU 543). One was that he held that the consideration for the agreements was unlawful under s. 24(a) and/or (b) of the Contracts Act 1950, in that the nine agreements by which the respondent came to acquire his 65% shareholding

G in the company contravened ss. 7A(3) and 10(4) of the REA 1967. The alternative reason was that the consideration for the agreements was unlawful under s. 24(e) of the Contracts Act 1950, in that the arrangement was an 'Ali Baba' scheme intended to circumvent the new economy policy of the government.

H **[8]** In his judgment, Lee Swee Seng JC remarked that '(the respondent) is himself a willing party to the illegal transactions and so should not be allowed to profit from any cost that might normally be granted in his favour'. This finding is material to the appeal before this court.

The Petition (For Winding Up)

I **[9]** A winding up order on just and equitable grounds was sought by the respondent in this case on the grounds alleged in his petition. The petition itemised 13 complaints against the appellants. The nature of these complaints

are essentially that there was failure of substratum of the company; breach of common law and/or statutory fiduciary duties by the appellants as directors of the company; management deadlock; justifiable loss of confidence in management; irretrievable breakdown of mutual trust and confidence between the parties; fraud and misappropriation of company fund, and excessive directors' remuneration by appellants. The respondent's main contention, both in this court and the court below, was that there being 'deception and misrepresentation by the directors of the company to the authorities, clients and public by presenting the company as owned and controlled by a Bumiputera'.

[10] Thus the sole issue canvassed before the learned JC was whether the respondent could rely on his own illegality to petition for the winding up of the company on just and equitable ground. The principal submissions of counsel in the court below were summarised by the learned JC at paras. 8-9 of her judgment:

> [8] It is the submission of the [respondent] that the said agreements which allow the [respondent] to own 65% shares of the company are illegal *ab initio* as they were executed to circumvent the statutory requirements of the Registration of Engineers Act and were contrary to public interest. As such, the carrying on of the business of the company is illegal, and that the company must be wound up in order to terminate the illegality.
>
> [9] However, it is the submission of learned counsel for the [appellants] Dato' Davidson that this Court should not assist the [respondent] as he is a party to the fraudulent arrangements and stands to benefit from the winding up of the company. Learned counsel submitted that the courts should refrain from taking sides in the disputes between the fraudulent parties and to leave the enforcement of the laws to the relevant authorities pertaining to the compliance of the Registration of Engineers Act 1967.

[11] In allowing the respondent's petition, the learned trial judge reasoned that:

> On the issue raised by the [appellants] that the [respondent] is privy to the illegality, it does not have any bearing as this court cannot endorse the existence of a company tainted with illegality. In this case, it is not so much that the court is enforcing the [respondent's] rights, but rather, the court is just upholding the law. On this issue I agree with the findings of Justice Mah Weng Kwai in *Perbadanan Pertanian Selangor v. Megafores Sdn Bhd & Ors* [2011] 8 CLJ 484 ("The *Megafores*"), where His Lordship held that it does not matter that the [respondent] was a party to the illegality. Once the illegality was discovered, the court has a duty to act on it …

Issue Before The Court

[12] The facts as outlined above are largely undisputed. What emerged from the essential facts recounted above is as follows:

A (i) that the arrangement witnessed by the nine agreements entered into between the respondent and the Australian company is illegal and contrary to public policy;

(ii) the company restructured pursuant to the said nine agreements is therefore tainted with illegality;

B (iii) the respondent has willingly participated in the illegal scheme; and

(iv) the respondent has not actually paid for his 65% shares in the company.

[13] Based on the foregoing the action in the present case is somewhat exceptional. The only relief sought in the petition is to wind up the company C on just and equitable ground. This is premised on the assertion that if a winding up order is not granted it would enable the appellants and the Australian company to continue to carry on the business in blatant disregard of the law and public policy. Whether this would be so is an issue to be determined in this appeal. Against this background, it is common ground, as D the matter now stands, that the sole issue for consideration is whether or not in the words of s. 218(i) of the Companies Act, it is just and equitable that the company should be wound up when the petitioner has participated and benefited from the illegal arrangement.

Discussion

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[14] Learned counsel for the respondent submitted and which submission we readily agree that generally a contract which is designed to circumvent a statute and to deceive a public authority is illegal in nature. That statement of principle finds ample support in local authorities (see *Suntoso Jacob v. Kong* F *Miao Ming & Anor* [1984] 1 LNS 32; [1986] 2 MLJ 170, *Teng Meow Chong v. Chia Ngim Fong & Anor* [1991] 1 LNS 35; [1991] 3 MLJ 452, *Fusing Construction Sdn Bhd v. EON Finance Bhd & Ors And Another Appeal* [2000] 3 CLJ 341).

[15] Similarly it is indisputable as submitted by learned counsel for the G respondent, that conducting business in this country through 'Ali Baba' type of companies is without doubt illegal as being contrary to public policy. (per Hashim Yeop Sani J (as he then was) in *Baldev Singh v. Mahima Singh & Ors* [1974] 1 LNS 13; [1974] 2 MLJ 206).

[16] Learned counsel for the respondent also asserted the well-known H principle that illegality is an issue the court is obliged to take notice of *ex proprio motu* once it is appraised of facts tending to support the suggestion. No court would knowingly be party to the enforcement of an unlawful agreement. (see *Keng Soon Finance Bhd v. M.K. Retnam Holdings Sdn Bhd & Anor* [1989] 1 CLJ 897; [1989] 1 CLJ (Rep) 1; *Thong Foo Ching & Ors v.* I *Shigenori Ono* [1998] 4 CLJ 674).

[17] Learned counsel for the appellants on the other hand referred to Lord Mansfield's speech in *Holman v. Johnson* (1775) 1 Cowp 341 in particular the following passage:

> The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this; *ex do lo malo non aritur actio*. The court will not lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiffs own standing or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; or where both were equally in fault, *potior est condition defendentis*.

[18] Relying on the aforesaid passage, learned counsel for the appellants urged the court to adopt what he termed 'the hands off approach', the doctrine the aid of which he invoked is based on the maxim '*ex turpi cause action non oritur*'. This traditional position in English law has been followed in Malaysia as seen in the following cases:

Palaniappa Chettiar v. Arunasalam Chettiar [1962] AC 294, *Keng Soon Finance Bhd v. MK Ratnam* [1989] 1 CLJ 897; [1989] 1 CLJ (Rep) 1, *Lim Kar Bee v. Duofortis Properties (M) Sdn Bhd* [1992] 3 CLJ 1667; [1992] 1 CLJ (Rep) 173 and *Thong Foo Ching v. Shigenori Ono* [1998] 4 CLJ 674.

[19] Learned counsel drew attention to the fact that the respondent in his proposed petition has indirectly admitted to having participated and benefited from the illegal arrangement by which the company was formed and that this would clearly be fatal to the petition.

[20] In allowing the respondent's petition for winding up and her rationale for so deciding, the learned JC it seemed is following an entirely different policy in dealing with issues of illegality, that is, the court must take an active role as enforcer of the law. These two positions according to learned counsel are incompatible with each other.

[21] With respect to learned counsel for the appellants we are unable to detect from a close examination of *Holman v. Johnson (supra)* any trace of the maxim being extended to a case of winding up. To our minds quite clearly *Holman v. Johnson* (and the 'hands off approach') appears to apply only in the context of enforcement of illegal contracts. Unlike the considerations in *Norman Disney & Young v. Afifi Hj Hassan* [2011] 1 CLJ 210; [2010] MLJU 543, enforcement of an illegal contract is not in the issue here. Thus *Holman v. Johnson* is of little assistance to the court when faced with a request to make a winding up order in respect of a company shown to be illegal in its inception, when that request is made by a party who is *in pari delicto*.

[22] The respondent has referred to us a number of cases which give guidance as to the attitude of the court where the formation of a company is for fraudulent or illegal purpose (eg, the case of *Re Thomas Edward Brinsmead & Son Ltd* [1897] 1 Ch 406, and *Padiberas Nasional Bhd v. Formula Timur Sdn Bhd* [2009] 8 CLJ 508). However learned counsel has not been able to find any other authority which gives guidance as to what policy or approach the court should take where the petitioner is a willing participant to the fraud or illegality.

[23] In this court, as below, counsel for the respondent relied mainly on the case of *Perbadanan Kemajuan Pertanian Selangor v. Megafores Nursery Sdn Bhd & Ors* [2011] 8 CLJ 484. In that case the parties were totally ignorant of the illegality as Mah Weng Kwai JC (as he then was) makes it plainly clear at para [6.2.1] of his judgment. The learned JC said, and we quote:

> It appears that the petitioner and all the respondents were acting in ignorance of the illegality at all material times.

[24] In these circumstances the learned JC understandably had no difficulty in ordering the company to be wound up. Having made the aforesaid finding His Lordship then added that "it does not matter that the petitioner was a party to the illegality. Once the illegality was discovered, the court has a duty to act on it".

[25] As seen earlier, the learned JC in the present case relied on this passage to hold that it does not matter that the respondent was a party to the illegality once the illegality was discovered, the court has a duty to act on it.

[26] The learned JC was not wrong to rely on His Lordship Mah Weng Kwai JC's finding (as it were) on this issue. Nevertheless in view of His Lordship's earlier finding that both petitioner and all the respondents were ignorant of the illegality at all material times, the facts in *Megafores* are somewhat different from the present case. *Megafores* could not be held to have conclusively decided on this issue.

[27] To answer the question posed before us that is what is the policy or approach of the court if faced with a request to make a winding up order in respect of a company shown to be illegal in its inception, when that request is made by a party who is *in pari delicto*, we need to look at some earlier English decisions.

[28] To begin with, *Charlesworth's Company Law* states 'the court will … order a winding up where a company was formed to carry out a fraud, or to carry on an illegal business' (18th edn, by SD Girvin, S Frisby and A Hudson, Sweet & Maxwell, p. 528). A similar position was taken in *McPherson The Law of Company Liquidation* (4th edn, by AR Keay, LBC *Information Services*, pp. 153-154):

> Fraud in inception: One of the first circumstances to be recognised as sufficient to justify a winding-up order was the fact that the company was what is called a "bubble company". As Vaughan-Williams J once observed, there has never been an attempt to define precisely what is a bubble company. However, Lord Esher applied this description to a company which was "only formed for the purpose, not of work, but of getting money from shareholders, and [which] was from the beginning a sham, a bubble, a trap", and in another case an order was made to wind up a company which was formed without any *bona fide* intention on the part of the directors to carry on business in a proper manner …

[29] In the case of *In re London and County Coal Company* [1866] LR 3 Eq. 355, the court found that the company was formed with a view that the promoters and directors were out to 'rob the public of so much money and put it into [their] own pockets'. The company was wound up on just and equitable ground. The essence of the court's decision is found in the following excerpt of Sir W. Page Wood VC's judgment:

> [the company] is a mere contrivance, under the guise of an agreement for the advantage of the company, to plunder the public to this extent. In that state of things, **it is expedient alike for the public, the petitioner, and these gentlemen themselves, who have paid not the least regard to justice and propriety, that the company should be at once abolished**. (emphasis added)

[30] In that case, the petitioner was the secretary of the company. The directors who allowed the petition to be presented were themselves involved in the illegality. Yet Vice Chancellor Wood saw no impediment in allowing the winding up of the company. It would appear from Vice Chancellor Wood's judgment that the winding up court should subordinate the narrow conception of what is just and equitable to broader considerations of practical expediency, based on the circumstances of the case if logic and common sense dictate it should be so. In other words there is power to wind up, if that is appropriate on the facts of a given case. Vice Chancellor Wood's conclusion is testament to this:

> Then I am asked to continue this wretched concern. I say, extinguished it must be; and although, perhaps, the parties might find a more beneficial mode of extinguishing it than through the medium of a winding-up order, a winding-up order I shall make.

[31] Two other cases provide further assistance on this issue. The first is *In the Matter of the Neath Harbour Smelting and Rolling Works (Limited)* [1886] 2 TLR 336 in which the petitioner was found actuated by indirect motives and his petition was not *bona fide*.

[32] Lord Esher ordered the winding up of the company which was 'from the beginning a sham, a bubble, and a trap'. The statements of principle was enunciated by Lord Lindley who in his speech offered this useful guidance:

> The question was whether, on the whole evidence, it was just and expedient that the company should be wound up … It was said that the petitioner had an indirect motive … but that did not, in his mind, weigh against all the other considerations in the case.

Lord Lopes concurred with the statement of principle and added that:

> He thought that in mercy to the petitioner, in mercy to the shareholders, in mercy to the public, and in mercy to creditors, this company ought to be wound up.

[33] It is immediately obvious from this passage that Lord Lindley did not accept that the winding up court was confined, in its deliberation of what was just and equitable in a winding up, to the petitioner's indirect motive. His concern was that whether it was 'just and expedient' that the company should be wound up. The most helpful part of that guidance lies, in our view, in the observation that the relief sought under the just and equitable ground should not be refused because of the petitioner's unclean hands.

[34] The second case is *Re International Securities Corporation Limited* (1908) 99 LTR 581. There, a petition was presented for an order for the compulsory winding up of the company on the ground that dealing in premium bonds was contrary to the Lottery Act, and was moreover carried on in a fraudulent manner. Although there were accusations by a director opposing the petition that it was not presented *bona fide*, the conduct of the opposing director was found wanting. Allowing the winding up, Swinfen Eady J said that:

> this is not only an illegal business and carried on fraudulently, but it is a fraud of a peculiarly mischievous character when the class of people on which it is practised is considered. In my opinion the company ought to be wound-up at once, and the only order that can be made is a compulsory one …

[35] Again, that passage appears to recognise the overriding considerations of what is just and expedient in the circumstances of the case. We take that passage, which to our mind is critical to a proper understanding of the test which the court has to apply when considering whether misconduct on the part of the petitioner defeats a winding up order, to mean that the court should not confine itself on the issue of *locus* and no more, which the petitioner must prove to entitle himself to relief, but rather at the whole range of facts adduced which may be essential to the establishment of what is just and expedient or equitable.

[36] In the subsequent case of *Re Bleriot Manufacturing Aircraft Company (Limited)* [1916] 32 TLR 253, Neville J said that 'the words "just and equitable" are words of the widest significance, and do not limit the jurisdiction of the court to any case. It is a question of fact, and each case must depend on its own circumstances.' That this must be the only hypothesis upon which the court proceeded is also supported by Mann CJ in the Supreme Court of Victoria's decision in *re The Producers Real Estate and Finance Co. Ltd* [1936] VLR 235 at 238:

> It was pointed out in another passage quoted by the Privy Council in *Loch v. John Blackwood Limited* [1924] AC 783, at 792 (per Lord Shaw of *Dunfermline*) "from that eminent judge and commentator Lord M'Laren", that the only discrimen laid down by the Legislature as to what is just and equitable in relation to the question of winding up is the opinion of the court: *Symington v. Symington's Quarries* [1917] 1 IR 67.

[37] The issue of the court's policy or approach raised in this case is an issue of general applicability in all compulsory winding up proceedings under the just and equitable ground. It should not turn solely on a minute examination of the petitioner's (the respondent) conduct, but rather on the broader considerations to which we have referred, in particular the practical consequences in dismissing the winding up petition. In this context the citation of the judgment of Lord M'Laren that the litmus test on what is just and equitable in relation to the question of winding up depends entirely on the opinion of the court is, undoubtedly apposite.

Our Findings And Decision

[38] In the light of the foregoing discussion, we would disagree with learned counsel for the appellants' argument that 'there is a total inconsistency of approach where the court upholds the illegality in the civil suit where the respondent was the defendant but allows the respondent as petitioner to rely on the same illegalities ...'.

[39] In our view completely different considerations apply to the two cases. In the first (ie, Suit 669), *Holman v. Johnson* (and the 'hands off approach') applies in contractual claims where the court would not lend its aid to a man who founds his cause of action upon an immoral or an illegal act; in the second as to what is just and equitable in relation to the question of winding up that is the opinion of the court - the question is whether, on the whole evidence, it is just and expedient that the company should be wound up. In this connection the illegality defence would not weigh against all the other considerations in the case.

[40] In *Re London and County Coal Company (supra)*, *In the Matter of the Neath Harbour Smelting and Rolling Works (Limited) (supra)*, and *Re International Securities Corporation Limited (supra)* laid down no new law, nor did they run afoul in any slightest degree to the principle in *Holman v. Johnson*. They are merely parallel development in the law of corporate insolvency. In the context of winding up on just and equitable ground, the case, in our judgment, does not rest on any narrow point as to the misconduct of the petitioner. The judgment of Vice Chancellor Wood, Lord Lindley and Swinfen Eady J show that the case turned on the opinion of the court on the whole evidence whether it is just and expedient that the company should be wound up. It may very well be that the seemingly anomalous position is difficult to fathom but the completely different treatment is, we think, well settled in the winding up jurisdiction of the court.

[41] As the learned JC opined at p. 19 of her judgment:

> As such, this Court is duty bound to address the illegality issue (even if the same is not pleaded), regardless of whether the fraudulent party is set to be the ultimate beneficiary. In the present case however, the Petitioner, the Company and the 1st Respondent are privy to the fraudulent and illegal acts. On the illegality issue, I am of the considered opinion that if the winding up order is not granted, the Company would continue to exist and carry on its business in blatant disregard of the Registration of Engineers Act 1967. To allow the Company to continue operation would tantamount to a continuing illegality and this is clearly against the Registration of Engineers Act 1967. In *Lim Yoke Kian & Anor v. Castle Development Sdn Bhd* [2000] 3 CLJ 369, the Court of Appeal held that the High Court Judge fell into error when he refused to grant the winding up order as the intention to defer the winding up proceedings was to minimise the payment of income tax which was clearly an illegality. Therefore, the Court must act on the illegality, and if the illegality can be terminated through the winding up proceedings, then the orders must be granted.

[42] Before concluding, we would refer to one further matter. It relates to learned counsel for the appellants' argument that 'this is a case of unjust enrichment since the respondent obtained his shares without paying for them through the illegal investment agreements and if this petition succeeds he is entitled to cash in on 65% of the net assets of the company'. This court was not addressed on how to deal with the perceived unjust enrichment on the part of the respondent as a result of the winding up of the company. In the absence of any submission on this point we hesitate to express any view on this issue.

Conclusion

[43] It follows, from the discussion above and our findings that this appeal fails and the judgment below is affirmed. The company is accordingly wound up. We award costs in the sum of RM10,000 to the respondent. The deposit is refunded.